

When is a Court a Court?

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The German Federal Constitutional Court (FCC) states in its (already) infamous [PSPP judgment](#) that “the specific manner in which the CJEU applies the principle of proportionality in the case at hand renders that principle meaningless for the purposes of distinguishing, in relation to the PSPP, between monetary policy and economic policy” (par. 127).

In the accompanying [press release](#), the FCC further emphasizes that ‘[the] review undertaken by the CJEU with regard to whether the ECB’s decisions on the PSPP satisfy the principle of proportionality is not comprehensible; to this extent, the judgment was thus rendered *ultra vires*.’

The claim presents a formidable challenge to the CJEU and brings the constitutional conversation between two judicial giants to a new level: What (method) does it take to be a court?

The FCC and the CJEU have a history of constitutional conversations (succinctly outlined [here](#)). The tone has not always been nice and friendly. In substance, however, those conversations seemed legally sophisticated and consequential to the process of integration: democracy, rule of law, human rights, supremacy. They were, most of us hoped, constructive. Audaciously, many of us believed, they have been enriching, doctrinally and theoretically, bringing conceptual sophistication, and furthering the understanding of the nature and the functioning of the supranational legal order (also beyond the idea of constitutional pluralism).

In practice, the engagement of highest national courts with the CJEU implied cooperation, and the acceptance of the European constitutional arrangement. National high courts seemed to understand and acknowledge that no court could rule a complex legal system in isolation and with impunity. The diversity of legal traditions, cultural perceptions and professional viewpoints was apparent, and at times clashing. But outwardly, courts seemed to practice mutual ‘recognition’ and respect of their ‘court-like-ness.’

The PSPP judgment has the potential to upend this quasi symbiotic arrangement (the naïve interpretation) or expose it as a sham (the cynical interpretation). The fact is that the FCC overtly considered the CJEU’s assessment of proportionality, a.k.a. its judicial method, substandard, and therefore the judgment (the outcome of the balancing act) was *ultra vires*.

The Danish Judgment

To be clear, this is not the first time that someone passionately objected to the CJEU’s method ([remember Hjalte Rasmussen](#)) and not the first time that someone

found it unappealing, neither (Margaret Thatcher comes to mind, among many others). It is not even the first time that a high court of a member state objected. In recent history, the Danish Supreme Court rebelled against conform interpretation in the [Ajos case](#) (*Case 15/2014 Dansk Industri, hereinafter 'the Danish judgment'* – do not look for it, the Danish Supreme Court took it off its website!). It saw conform interpretation, methodologically, as an intrusive foreign element that had no place in the Danish legal system, and something highly unbecoming to a self-restrained court.

By refusing to twist the meaning of the Danish law to the point where its interpretation would be *contra legem* (in its own opinion, and contrary to the opinion of the Advocate General and the Danish government), the Danish Supreme Court refused to give horizontal direct effect to the unwritten general principle of EU law (discrimination on grounds of age). A court, committed to textualism, felt uncomfortable and unable to break out of its interpretative way to override thirty plus years of its case law, written national statutes, and the principle of legal certainty. And it felt especially uneasy about disapplying the national law. This was against its core mission: to apply the valid Danish law. The Danish Act of Accession, the Danish Supreme Court reasoned, did not give it the mandate to rewrite that law with unwritten European principles, which were fuzzy and questionably (methodology wise) deduced from the spirit of the Treaties.

The reasoning of the Danish Supreme Court oozes the apparent virtue of judicial restraint, giving weight to legislative texts and especially to the intention of the legislator (extensively citing the preparatory works, ministerial records, and parliamentary debates). Similarly, the discourse of the FCC oozes judicial virtue and craftsmanship. In contrast to the Danish judgment, it is written in the most elegant and sophisticated legal prose. But that should not distract us from two facts:

First, the FCC is teaching the CJEU how to apply the proportionality test when interpreting EU law (SIC!) and it feels entitled to do so because, “[t]he methodological standards recognised by the CJEU for the judicial development of the law are based on the (constitutional) legal traditions common to the Member States (cf. also Art. 6(3) TEU, Art. 340(2) TFEU), which are notably reflected in the case-law of the Member States’ constitutional and apex courts and of the European Court of Human Rights.” In other words, these standards are German standards, too, and they are elaborated and upheld in the German constitutional practice.

Moreover, the FCC holds that the CJEU “cannot simply disregard such practice. The particularities of EU law give rise to considerable differences with regard to the importance and weight accorded to the various means of interpretation. Yet the mandate conferred in Art. 19(1) second sentence TEU is exceeded where the traditional European methods of interpretation or, more broadly, the general legal principles that are common to the laws of Member States are manifestly disregarded.”

Second, the methodological critique comes across as a mask for a profound dislike of the outcome of the balancing test, and the constitutional implications, which it ultimately involves (and which are being widely blogged here and elsewhere).

The FCC exposes the CJEU's use of proportionality as a façade, a cover for its reluctance to engage in a genuine and consequential constitutional debate worthy of the apex court (I wonder whether an economist could tell us – with or without reading the case law – where to draw the line between monetary and economic policy. And, I would suggest, there is something good to be said about marginal review when complex economic and technical assessments are at play). Simply, the CJEU's standard of review is just too low, too lax, too permissive. This is a quite refreshing rationale to all of us who were schooled into looking at the methodology of the CJEU as a façade for “unbridled policy making,” a gallop to total erosion of national competence (Hjate Rasmussen, of course).

But the fact that judicial method is not apolitical and that legal texts don't determine the method of their interpretation, is yesterday's news to anyone that has ever set foot in a court (or read any book on legal argumentation, judicial behavior or legal language – so, basically, any book that one can get her hands on in a law library).

Lessons on how to be a court

So, why do I think that the FCC brought the challenge to a whole new level?

Here is the crucial and most important difference between the Danish judgment and the judgment of the FCC: The FCC is teaching the CJEU how to be a court worthy of the title. And it is doing so for the most unsophisticated of all reasons: The FCC does not like the outcome.

First, it is more than a faux pas in the dance of interpretation and European judicial discourse to call a fellow court incompetent and unable to perform its core function up to a judicial standard. It is a clash.

Second, it is because I tend to interpret the FCC's move as a violation of the unwritten “code of professional ethics” that binds European judges as *a corps*. It is their duty and responsibility to continuously reassure the legal actors and the general public that while we might not always agree with the outcomes that they reach, they reach them in conformity with the rules of law and using the accepted and acceptable judicial tools *lege artis*. In other word, that they know what they are doing, and that they are doing their job up to a (professional) standard. Law (and I include the rule of law, just to avoid any misunderstanding) thrives on misrecognition (Bourdieu). By violating the code, the FCC might have demonstrated the mastery of the technique (or not even, as suggested by other commentators). At the same time, it tore down the wall of perception of neutrality and universality, the core elements that sustain the force of law. We have nowhere to go in search of judicial authority. Alas. But, things could have been different. When we still innocently discussed supremacy, thanks to those constitutional conversations that I mentioned above, Joseph Weiler suggested we thought along the lines of constitutional tolerance. How about if we, in light of the latest development, extended this thinking to methodological acceptance, as a potpourri of mutual recognition and constitutional tolerance that would eliminate the foul smell of incompetence. How would it work? When the CJEU interprets EU law and uses the methods of interpretation that it

deems suitable for the legal text that it is interpreting, and explains its choice of method, we will not second guess them. Even when they are impossible to apply to the national law. Just like if the consumer can tell the difference between butter and margarine, it does not matter whether the latter comes in a cube or any other form (Rau, obviously). Maybe the judgment of the FCC is a desperate cry for more methodological integrity and if it is, we should be willing to go along with the argument.

